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The State of Utah v. C. H. Chealey : Brief of Appellant

Utah Supreme Court

J. Lambert Gibson; Charles Welch, Jr.; Attorneys for Defendant and Appellant;

IN

THE SUPREME COURT

OF THE

STATE OF UTAH

THE STATE OF UTAH,

Plaintiff and Respondent

vs

C. H. CHEALEY,

Defendant and Appellant

APPELLANT'S BRIEF

Appeal From the Third District Court of
Utah, for Salt Lake County
Honorable Will L. Hoyt, Judge

J. LAMBERT GIBSON
CHARLES WELCH, JR.
Attorneys for Defendant and
Appellant.

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IN THE SUPREME COURT

OF

THE STATE OF UTAH

THE STATE OF UTAH,

Respondent,

vs

Case No.

C. A. SHELLEY,

Appellant

Appeal from the District Court of the Third Judicial District of the State of Utah, within and for Salt Lake County.

WILL L. HOYT

A P P E L L A N T ' S B R I E F

J. LAMBERT REEVE - CHARLES WELCH JR.

ATTORNEYS FOR APPELLANT

APPELLING CRIME OF DEFENDANT AND APPELLANT

I

STATEMENT OF THE CASE

The appellant was charged in the Information with the crime of involuntary manslaughter, said alleged crime arising out of the operation of an automobile; to which charge the appellant entered a plea of not guilty; the appellant was charged by the State with operating a motor vehicle in a northerly direction near the Draper crossroads on U. S. Highway number 91. The evidence tended to show that the defendant had picked up certain hitch hikers, among whom was the deceased, who was riding the bed of the truck which defendant was driving; that while so driving, the defendant along with another occupant of the car drank some alcoholic beverages; that as the car approached the above mentioned place, the defendant ran his car off the road to the right, the defendant claiming that this was done to avoid a head-on collision and in doing so overturned the truck throwing the deceased against a telephone pole, the resulting impact causing the death of the deceased.

The case came on regularly for trial on the twenty second day of January, 1940, before the Honorable Will L. Hoyt, District Judge. The jury after hearing the evidence and considering the same brought in a verdict of guilty of the crime charged in the information. Thereafter, appellant was sentenced to imprisonment in the County Jail, of Salt Lake County for a term of one years, "provided however that there be a stay of the last four months of the sentence, "subject to the further order of the Court." The appellant appeals from such judgment and conviction.

II

COMPLAINT

The complaint, omitting the title of the Court and cause and preliminary matters reads as follows, to-wit:

"That the said C. A. Cooley, at the time and place aforesaid, killed Harlan Junior Axfold without malice; contrary to the provisions of the Statute of the State aforesaid, in such cases made and provided, and against the peace and dignity of the State of Utah."

III

The appellant relies upon the following error alleged to have been made by the Trial Court during the conduct of the trial below:

A. That the Trial Court erred in refusing to disallow appellant's challenge for cause against Edwin Bliss, juror, after the said Edwin Bliss had expressed a prejudice and bias towards drinking of intoxicating liquors when there occurred an automobile accident in which intoxicating liquor was involved.

(Trans. 62-67, Abs. 7)

B. That the Trial Court erred in denying the motion of the defendant for the dismissal of the case at the conclusion of the State's evidence for the reason that there was no causal connection shown between any unlawful act and the death of the deceased.

(Trans. 149, Abs. 39)

C. That the Trial Court erred in refusing the defendant's motion for a directed verdict at the end of the case for the reason that there was no causal connection shown between the drinking and the accident which resulted in the death of the deceased, and

crime charged and the guilty act or intent or act of negligence as is required by the law of the State of Utah. (T 137 - A 60)

D. That the Court erred in permitting the witness Leroy D. Williams to testify as an expert. (T 101 - A 22)

E. That the Trial Court erred in admitting into evidence State's Exhibit A over objection. (T 144 - A 37)

F. That the court erred in overruling the defendant's objection to the conversation between Luther V. Smith and Lote Kinney at a time when the defendant was not present, for the reason that said conversation was hearsay as to the defendant. (T 147)

G. That the Trial Court erred in refusing to grant defendant's proposed instruction regarding the term "MALICE AFORETHOUGHT."

H. That the Trial Court erred in refusing to grant defendant's proposed instruction number 3 regarding proximate cause. (T A 62)

I. That the Trial Court erred in refusing to grant defendant's proposed instruction number 4

regarding the emergency rule, which is as follows: "If the jury finds that the defendant acted as a reasonable prudent man would act under the circumstances to avoid an accident then he is not liable for the unforeseen consequences of his act and is not guilty." (T 62)

IV

ARGUMENT

The above set out assignments of error upon which the appellant relies will be discussed in the sequence heretofore given.

A

THAT THE COURT ERRED IN REFUSING TO DISMISS THE JURY, AFTER A RULE ON CHALLENGE FOR CAUSE. (T 62-7 - A 97)

The situation that brought about the challenge was as follows: The jury had been questioned by the Court when J. Lambert Gibson, one of the appellant's attorneys asked the following question: (T 62)

MR. GIBSON: I would like to have another question asked, whether they have any prejudice in or itself to a man taking a drink, or any religious

scruples against it."

THE COURT: You have heard the question stated by counsel, whether any of you do have an religious scruples or strong antipathy against a man taking a drink of liquor.

A JUROR: (This man was Juror 2 Wm Bliss, see T. page 67.) I would if an automobile accident was involved, that was relating in any way to an automobile accident, I would be very strong against it, not a religious matter, otherwise.

THE COURT: Do you mean by that if the evidence in this case showed that a man, although he had taken a drink or two of beer and was not in any way intoxicated, would you still have a strong antipathy against the habit of drinking, so that it might influence you, although you believed from the evidence that his faculties were not disturbed or upset. Any of you.

A JUROR: I distinctly believe a man should not drink that drives an automobile.

Following the above questions and answers, Mr. Midgley was excused from the jury for stating a definite prejudice. Counsel then asked that Mr.

Bliss be excused. Mr. Rawlings resisted the challenge. Mr. Bliss then in contradiction with his previous answer said that he would not be prejudiced. The challenge was refused. (T 65-7)

Juror Bliss clearly indicated in his answer to the first questions propounded to him that he was biased to the extent that he could not fairly consider the evidence presented before the Court. The situation comes clearly within 105-31-13, Revised Statutes of Utah, 1933, the subdivision relating to when jurors may be challenged for cause for indicating actual bias as follows:

"A particular cause of challenge is:

(.) for the existence of a state of mind on the part of the juror which leads to a just inference in reference to the case that he will not act with entire impartiality, which is known in this code as actual bias."

Mr. Bliss had formed the opinion prior to trial that he could not give a fair decision if there had been an automobile accident in which the drinking of intoxicating liquors was an element.

See the case of State of Utah vs Abel, 23

Utah 541, 62 Pacific 494, which holds that a juror was properly excused upon a showing that he had formed an opinion of the merits of the case.

In the case of State of Utah vs Morgan, 54 Utah 225, 236 Pacific, the subject of actual and implied bias is discussed at length and supports appellant's contention that Juror Bliss should have been dismissed because of the statements he made in response to the first questions propounded to him by the Court.

In the case of State of Montana vs Huffman, 89 Montana, 194, 296 Pacific 780, at page 790, the Court discussed the point of a juror admitting bias and prejudice in the early questioning of the juror and then under later questioning stated that he, juror, could and would consider the evidence impartially. A portion of the decision is quoted:

"Further, the trial court is the judge of the weight to be given to the testimony adduced on a voir dire examination, and if the trial Court has any doubt as to the existence of such a state of mind as would disqualify a juror, the court should sustain a challenge to such a juror in the interest

of justice (State v. Russell, 73 Mont. 2[illegible], 235 P 712), and, where a juror admits bias, his subsequent statement that he can consider the evidence impartially should be received with caution, for, "Even though a juror be biased, he will, it is said seldom admit inability to act impartially" (16 Cal. Jur 43[illegible], and cases cited., On the record, we are of the opinion that the court properly exercised its discretion in excusing juror Boslaugh."

Juror Bliss had exhibited such bias that he most certainly could not have considered the case impartially. The situation presented before the Court was exactly the same as was presented before the court in the case of State vs Huffman supra. The denial of the challenge for cause made it necessary that juror Bliss be excused from the jury by one of the defendant's peremptory challenges. This was prejudicial to the defendant inasmuch as the peremptory challenge so used might have been used otherwise.

POINT THE COURT ERRED IN REFUSING MOTION FOR DISMISSAL FOR LACK OF CAUSAL CONNECTION BETWEEN UNLAWFUL ACT AND DEATH OF DECEASED.

The appellant contends that to convict him of involuntary manslaughter the State must show that, "death must have been the natural and probable consequence of the unlawful act, and the not the proximate cause," (29 Corpus Juris Page 1159) of the death of the deceased, Harlan Kofold.

No place in the State's evidence does it appear that the appellant had not been able to handle the truck in a proper manner, neither is there any evidence to show that the appellant was drunk or under the influence of liquor prior to the time of the accident.

LeRoy Nish, the boy who rode the truck from Cove, Utah to the place of the accident was not questioned by the prosecuting attorney on the matter of the appellant's drinking or on his ability to drive the truck. (T 72-82, Abst. 11-13)

The testimony of Donald Beck fails to show that the appellant acted in any other than normal though

it did show that the appellant imbibed some liqu

MR. GIBSON asked the following questions on cross examinatio , concerning the appellant's actions immediately following the accident. (Trans. 95)

Q. Did he seem anxious about how you were feeling at all?

A. I believe he acted like it.

Q. He seemed to be didn't he?

A. Yes.

The only other testimony on this point was the testimony of the investigating officers.

This testimony is in conflict.

Mr. Scheib in response to questions propounded by Mr. Rawlings, the District Attorney, stated that he had a conversation with the appellant at the County Jail and further testified as follows:

A. "yes, sir, I talked to him when I got to the County Jail. It was asked if I knew him; knew who he was. I said, yes, that I knew him. I said his name, then I talked to him. I asked him a few question of hi , he was very incoherent; he couldn't talk very plain; he couldn't hold himself very erect, he was very relaxed; he had a glassy stare in his eye, and was very obviously drunk." (T 122-123.)

Subsequently, witness Scheib (T 132-7) stated appellant gave mixed up and incoherent answers.

The witness, Kinney, another County Officer who has with Mr. Scheib at the County Jail at the time above mentioned (T 137) testified as follows on cross examination:

Q. At the time you talked to the defendant how many times did you have to repeat the questions to him?

A. I don't know--there was just one point on which he had some difficulty.

Q. Otherwise he could give you coherent answers?

A. Yes, I understood him perfectly.

(T 139-7, A 60.

The evidence as set out above did not show that the appellant was drunk. The investigating officers who saw and interviewed the defendant soon after the accident gave contradictory statements as to the appellant's condition and reaction. Mr. Kinney said that he was coherent, that the he understood

him promptly. Donald Sed, stated in substance that the appellant seemed anxious about him, which is the action of a normal man and not the action of one so incensed that he would run a truck off the road without reason.

The state did not show by the time the State rested that the death of Harlan Kofold was a "natural and probably consequence of the unlawful act, and the proximate cause."

In the case of Foster vs State 162 Ind. 213-70 N.E. 129. The defendant carried a gun contrary to statute. He got into a scuffle with his friend. The friend was killed by the discharge of the gun. The defendant was convicted of involuntary manslaughter. The Supreme Court in the State of Indiana said (at Page 131) "It is undoubtedly true as a general rule of law, that a person engaged in the commission of an unlawful act is legally responsible for all of the consequences which may naturally or necessarily flow or result from such unlawful act." The Indiana case was reversed. Since the death was not "a natural or necessary result." In the case at hand, the death of Harlan

Kofold, ruling on the bed of the appellant's ...ruc.. was not a "natural and necessary result" of the previous acts of the appellant.

See also the case of Pe...le vs ...rnes, 182 Mich, 479, ... N. W. 400. In the case the de...endant drove at a greater speed than was allowed by law. is automobile ran over and killed a person who was in the street. The defendant was convicted of involuntary manslaughter. This case was reversed by the Supreme Court of Michigan on the ground that death did not necessarily ensue as a direct and natural result.

See also case of State vs Linyan, decided by the Supreme Court of Utah on June 5, 1 38, 97 Utah Reports, page 180, 91 Pacific 2nd 457. This case will be referred to under later sections.

C

THAT THE COURT ...D IN REFUSING THE DEFEND-A...'s MOTION FOR A DIRECTED VERDICT.

(T 137 A 50)

Counsel for the defense moved after all the evidence was in for a directed verdict in two

grounds, to-wit:

1. That there had been shown no causal connection between the drinking on the part of the appellant and the death of Harlan Kofold.

2. That there was not shown any joint act and intent, or criminal negligence as is required by the laws of the State of Utah.

1.

Lack of Causal Connection

Consideration was given to this point under (3) supra. There was no further testimony given by the defense to substantiate the State's position that the accident was caused by the drinking of the appellant prior to the accident. Evidence presented by the defense tended to show that the defendant turned off the road to avoid an oncoming vehicle. See section I ante. Also T 130 A 33.

(T 134 A 41)

2.

Lack of a showing of joint act and intent or criminal negligence.

The necessity of a union of act plus intent or criminal negligence is fundamental in criminal law.

The provision in our Utah Code is as follows: Revised Statutes of Utah 1953 76-1-19, "In every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence."

In this case there was not enough evidence to show that the appellant was drunk. There was no evidence of speeding or other negligent act. The evidence presented by those who were in the cab of the truck (the only witnesses who actually saw the whole of the accident) was to the effect that the defendant and appellant acted reasonably to avoid a head-on collision with an oncoming car.

See the discussion under I, also T 130 A 32. (T 114 A 41)

I

THAT THE COURT ERRED IN PERMITTING THE WITNESS LE ROY D. WILLIAMS TO TESTIFY AS AN EXPERT ON HANDWRITING FOR THE REASON IN THAT HE WAS NOT PROPERLY QUALIFIED AS AN EXPERT ON HIS OWN TESTIMONY. (T 191)

The appellant contends that Le Roy Williams by his own testimony disqualified himself as an expert in handwriting, and so his testimony in

which he proports to identify the handwriting on the State's proposed exhibits E, F, and G, should not have been admitted.

MR. GIBSON on voir dire examined the witness as to his qualifications. The questions and answers were as follows: (Tr. 101 A 22-33)

Q. Mr. Williams, what was your occupation before four years ago when you started to work for the Liquor Control Commission?

A. Traveling salesman.

Q. Have you gone to school or taken any course of study in handwriting?

A. No, I never had any course at the university. I had occasion to use it very extensively when I had charge of the files for the U. P. Railroad for six years.

Q. You had no special training, just picked it up, and say this is the same, or isn't the same writing?

A. Yes.

Jones Commentaries in Evidence, page 388, quotes Mr. Justice Lee in Jones vs Tucker 41 N. ..

546 "An expert must have been the subject upon w. he gives his opinion a matter of particular, study, practice, or observation, and he must have particular and special knowledge on the subject."

It is apparent from the answers witness made to the questions propounded to him that he did not have "particular and special knowledge on the subject."

E

THAT THE COURT ERRED IN ADMITTING INTO EVIDENCE STATE'S EXHIBIT "A" OVER OBJECTION.

(T 144 A 77)

The court admitted into evidence a bottle of whisky found yards away from theaccident in a beet field. The only evidence tending to tie it with the accident is the testimony stating that the defendant had purchased that brand of liquor and the testimony of the witness Sjoblom who stated that he saw a bottle of whiskey at that accident that looked like Exhibit A but he didn't know whether or not it was the same bottle. This is not enough of a connection to tie Exhibit A with the accident. There are thousands of bottles

of Gold and Whiskey should in this State. No instruction was given concerning the weight the jury should place on the evidence so admitted. (T 144 A 37)

F.

THAT THE COURT ERRED IN OVERRULING THE DEFENDANT'S OBJECTION TO THE CONVERSATION BETWEEN LUTHER M. SMITH AND LOTE KINNEY AT A TIME WHEN THE DEFENDANT WAS NOT PRESENT, FOR THE REASON THAT SAID CONVERSATION WAS HEARSAY AS TO THE DEFENDANT. (T 176)

Any conversation had between the witness Luther Smith and Lote Kinney in the absence of the defendant was hearsay. That is elementary law. The only excuse for admitting such conversation into evidence is that it comes within one of the exceptions to the hearsay rule. The state did not claim to be using this testimony as such exception but for the purpose of impeaching the witness Luther M. Smith. No attempt was made to try Smith for perjury, nor was there any intention to so do. The only reason the State followed

this line of reasoning was to discredit the defendant and to make him responsible for the witness's statements.

(T 169)

C

THE COURT ERRED IN REFUSING TO GRANT DEFENDANT'S PROPOSED INSTRUCTION NUMBER TWO. (T. 141 A 61). The written instruction which was requested is as follows:

"You are instructed that the term, Criminal Negligence, under the laws of the State of Utah does not merely mean the failure to exercise ordinary care or that degree of care which an ordinary prudent person would exercise under like circumstances. It means gross negligence. It is such negligence as amounts to a reckless disregard of the consequences and of the rights and safety of others." (A 61)

The appellant contends that the above proposed instruction is clearly within the court's ruling in the case of State vs Lingman, decided by the Supreme Court of Utah on June 5, 1939,

97 Utah Reports [illegible], 61 Pacific 2nd 467 at page [illegible], Utah Reports.

The Supreme Court in instructing the lower Court as to the proper instruction in the Lingman case said the following: "In consequence the instruction of the Court on this question in this case may be substantially as follows: If the jury find that Mrs. Layton was killed by the impact and the impact was caused by the driving of the defendant in a reckless manner or with such disregard for the safety of others as charged in the information, then such driving being unlawful and in violation of the provision of Title 57 as set forth sustains a conviction of manslaughter." The underlined portion in the quotation is ours.

The Court in the same case at page 198 Utah Reports said "We think the unlawful act, that is the instruction must be done in such a manner as to more than constitute a mere thoughtless omission or slight deviation from the normal prudent conduct. It must be reckless or in marked disregard for the safety of others. The underlining is ours.

The Court will observe that some of the wording in the proposed requested instruction is identical to the wording of the Court in the above quotation.

II

THAT THE COURT ERRED IN REFUSING TO GRANT DEFENDANT'S PROPOSED INSTRUCTION NUMBER THREE.

The written instruction which was requested is as follows: "You are instructed that in order to find the defendant guilty, you must find that the death was the direct and proximate result of the criminal negligence of the defendant." (A 97)

The appellant contends that the proposed instruction is within the language of the Hargman case 97 Utah Reports 169, Pacific 2nd 457.

See also on this point 26 Corpus Juris 1150 and cases cited.

The author of Corpus Juris at page 1150 says "Death must have been a natural and probable consequence of the unlawful act and the act of

see also in this connection our complete discussion under section "I" as it is our opinion that both instructions are closely related, and the discussion is applicable under this section also.

The burden was on the State to prove that the drinking which the defendant had been doing prior to the time of the accident was what caused him to drive the truck off the road.

This, the State wholly failed to do. No evidence of bad conduct or poor driving on the part of the defendant was presented. The jury should have been instructed under proposed instruction number "1" or some similar instruction so that it could have considered the possibility of some thing other than the defendant's drinking, being the proximate cause of the accident.

I

THAT THE COURT ERRED IN REFUSING TO GRANT DEFENDANT'S PROPOSED INSTRUCTION NUMBER FOUR.

The written instruction which was requested is as follows:

"If the jury finds that the defendant a reasonable prudent man would act under the circumstances to avoid an accident then he is not liable for any unforeseen consequences of his act and is guilty." (A 97)

The appellant contends that the instruction requested is a statement of the law of ordinary negligence. That instruction as the case is predicated on an automobile accident and has explanation of the case of the accident was given by the defendant while he testified on his own behalf, and was substantiated by the testimony of the man who occupied the front seat of the truck with the appellant at the time of the accident, that the jury should have been instructed as requested so that it might have properly considered the explanations given by the defendant and the witness. The testimony of the defendant and the appellant on the point involved is as follows: (R 130)

A. Well, just before I approached the Draper Cross roads there was a large truck coming down the highway, and all at once there was a car shot out from behind the truck directly in my line of traffic

it was either a matter of hitting the truck head-on or going off the side into the narrow pit, and I chose to go off the road.

(T 11 A 52)

The testimony of witness Luther Smith is in explaining how the accident occurred as follows:

Q. Did you see what caused the accident?

A. Yes.

Q. What was it?

A. It was a truck coming towards us and a car come around the truck, a car that had a California license.

Q. You say there was a car coming south.

A. It was a truck.

Q. A truck coming south, and there was a car came around the truck?

A. Yes.

(T 154 A 41)

See also the cross examination of the witness on page 156 and 157 of the transcript.

If the appellant in turning off the road acted as a reasonable prudent man in doing so then he is not

was not a proximate cause of the death of the deceased. The jury should have been instructed to consider the point. The failure to so instruct the jury tended to prevent the jury from considering the appellant's only defense.

See Blashfield's "Cyclopedia of Automobile Law and Practice Volume 1 Paragraph 671, Page 48 on the question of the legal responsibility of a driver of an automobile acting under the "emergency rule."

Respectfully submitted,

J. LAURENCE GIBSON

CHARLES WELCH JR.

Attorneys for Carroll and Chesley, defendant and appellant.